

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From April 1, 1961
Through June 30, 1961
VOLUME 103

MACDONALD GALLION, Attorney General



T. O. "Tillie" Walker

QUARTERLY REPORT
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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1961 through March 31, 1961, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MACDONALD GALLION
Attorney General

MACDONALD GALLION

Attorney General

Edwin Strickland

Administrative Assistant

Assistant Attorney Generals

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Revenue

Herbert Burson

William H. Burton, Jr.

B. Frank Loeb

Charles P. Miller

James R. Payne

OPINIONS

April 14, 1961

Mrs. Jessie Mason

Register, Circuit Court

Franklin County

Russellville, Alabama

Condemnation—Costs and Fees—Intoxicating Liquors
—Sheriffs.

There is no seizure fee allowed the sheriff for confiscating an automobile in the transportation of illegal beverages.

Opinion by Assistant Attorney General Webb.

Dear Mrs. Mason:

I have received your letter of March 29, 1961 requesting an opinion of this office as follows:

"Please advise me what is the seizure fee allowed the sheriff of the county for confiscating a car used in the transportation of liquor, when said car is later sold under order of the Court as contraband.

"Is the sheriff entitled to \$50 seizure fee as per Title 29 Section 246 of the Code of Alabama?"

Title 29, Section 246, as amended by Act No. 669, Acts of Alabama 1949, page 1032, cited by you, reads as follows:

"The property may be ordered sold and the proceeds, after paying the costs and expenses of the seizure and of the suit and after paying out of the proceeds the sum of fifty (\$50.00) dollars to the sheriff or officer or other person who secured the seizure and whose efforts resulted in obtaining the decree of condemnation, shall be paid into law enforcement fund to be used and applied on the enforcement of state laws under the supervision and control of the Governor."

The word "property" refers to that property mentioned in the preceding sections, that is, ". . . all appliances . . . used . . . for the purpose of distilling or manufacturing any prohibited liquors or beverages . . ." (Section 244 of Title 29, Code of Alabama 1940.) I am, therefore, of the opinion that Section 246, as amended, *supra*, has no application to the facts submitted by you.

This office has previously held that the fees authorized for transportation condemnation cases are those provided for by the provisions of Section 4782 of the 1923 Code. Quarterly Report of the Attorney General, Volume 16, page 248(250). Section 4782 has been carried forward as Title 29, Section 251, Code of Alabama 1940, and provided for

a fee of one-fourth of the proceeds of the sale to the officer making the seizure and furnishing proof necessary for the condemnation. See also Act No. 126, General Acts of Alabama 1947, page 38.

Section 251, supra, however, was further amended by Act No. 669, Acts of Alabama 1949, page 1032, which completely changed the distribution of the proceeds of the same and removed the fees accruing to the officer seizing the vehicle. I am, therefore, of the opinion that there is no fee authorized the sheriff for confiscating an automobile used in the transportation of prohibited liquors. Title 11, Section 1, Code of Alabama 1940.

Very truly yours,

MACDONALD GALLION

Attorney General

April 21, 1961

Honorable Russell Plunkett

Register, Circuit Court

Cullman County

Cullman, Alabama

Municipalities—Officers and Offices—Registers—Salaries.

1. A register of a circuit court holds an office of profit.
2. A councilman who is entitled to compensation holds an office of profit.
3. A councilman who is not entitled to compensation does not hold an office of profit.
4. A public officer may not waive his compensation provided by law.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of March 27, 1961, is as follows:

"Will you please give me an opinion on the following question:
"Can I, as Register of the Circuit Court of Cullman County, Alabama, in Equity, hold the office of Member of the City Council of Hanceville, Alabama, of which I am a resident, with or without pay, as set out and defined in the Code of Alabama, Title 41, Section 5?"

"I respectfully refer you to **Rep. Atty. General**, July-Sept., 1943, p. 58, viz:

"Likewise he may hold the office of alderman without pay. The two offices are not incompatible positions and the same person may at the same time hold both'."

Section 280, Constitution of Alabama 1901, provides that no person shall hold two offices of profit at one and the same time in this State except justices of the peace, constables, notaries public and commissioners of deeds.

By virtue of Title 41, Section 5, Subsection 7, Code of Alabama 1940, no person shall hold two offices of profit in this State except notaries public.

A State, county or municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the State, the term and salary or prerequisites of which are fixed by law, is an office of profit under the State within the meaning and purview of the above constitutional and statutory provisions.

State ex. rel. Glenn v. Wilkinson, 220 Ala. 172, 124 So. 211; and **State v. Sanders**, 187 Ala. 79, 65 So. 378.

This office has heretofore held that the office of register of any of the circuit courts of this State constitutes an office of profit and falls within the scope of the above constitutional and statutory provisions. Quarterly Report of Attorney General, Vol. 52, page 238.

Title 37, Section 404, Code of Alabama 1940, as amended by Act No. 112, Acts of Alabama 1956, page 170, authorizes a municipal council to fix the salaries of its councilmen. Such salaries must be fixed by ordinance or resolution not less than six months prior to the election of the councilmen who receive same. In the event that no salary is fixed in accordance with the provisions of Section 404, as amended, *supra*, the councilmen are entitled to no compensation.

If a councilman is entitled to receive a salary, he may not waive his compensation. Our courts have held that such a waiver is against public policy. See cases cited in Quarterly Report of Attorney General, Vol. 88, page 8.

Therefore, a councilman for whom a salary has been properly fixed holds an office of profit. Quarterly Report of Attorney General, Vol. 82, page 20. However, a councilman who is not entitled to compensation does not hold an office of profit. Quarterly Report of Attorney General, Vol. 32, page 154.

Premises considered, I am of the opinion that you may not at one and the same time hold the offices of Register of the Circuit Court of Cullman County and councilman of the town of Hanceville, if a salary has been properly provided for said office of councilman. However,

you may hold both offices at one and the same time if no compensation is provided for said office of councilman.

Yours very truly,

MACDONALD GALLION

Attorney General

May 15, 1961

Honorable F. D. Main

Judge of Probate

Bullock County

Union Springs, Alabama

Motor Vehicles—Licenses—License Tags

1. The laws of this state do not require a migrant worker or any other person required to purchase a motor vehicle license in this state to surrender in doing so license plates which such person purchased in another state for the same year.

Opinion by Assistant Attorney General Burton.

Dear Sir:

I have your letter of April 28, 1961, which reads as follows:

"Does a person have to surrender his tag to the Tax Assessor when he comes into this State, and wants an Alabama tag?"

"We have cases of migrant workers, who work part of the year in other states, and come back to Alabama, which is their home, but go back after a few months stay here.

"We will appreciate your opinion as to whether the out-of-state tag has to be surrendered in order to get an Alabama tag."

Your question is answered in the negative. There are no provisions of law in this state that would require a migrant worker or any other person to surrender license tags purchased in another state in purchasing such tags in Alabama for the same year. In the case of certain commercial vehicles which are used by their owners in business activities in more than one state, a license tag is usually required to be purchased in each of the states in which such vehicles are so operated. To require such licensees to surrender license plates acquired in another

state under the circumstances would not only deprive these people of property belonging to them, but would work a hardship and an injustice. The validity of such a requirement, if there was one, then would be highly questionable.

Very truly yours,

MACDONALD GALLION

Attorney General

May 5, 1961

Honorable Robert Newman

President Alabama Association

of Circuit Court Clerks and Registers

Troy, Alabama

Costs and Fees—Clerks of Circuit Courts—Registers.

Act No. 542, Acts of 1957, page 762; Act No. 543, Acts of 1957, page 764; Act No. 740, Acts of 1957, page 1169; Act No. 741, Acts of 1957, page 1170, and Act No. 742, Acts of 1957, page 1171, relating to the costs and fees accruing to the clerks and registers of the circuit courts is discussed generally.

Opinion by Assistant Attorney General Hardin

Dear Sir:

Your request for an official opinion bearing date of February 6, 1959, is as follows:

"I would like an opinion on the following for the clerks and registers.

"1. In Equity Court, there are a large number of divorce cases involving child custody and alimony, which cases have had final decrees rendered in them. There are also estate cases and guardianship cases in which there are settlements every one or two years. When a new petition is filed in the case would the register be entitled to the old or new fees in this proceeding? It is the same case, but is being reopened.

"2. Title 11, Sec. 89-2. For each misdemeanor case originating by affidavit when the defendant is tried \$7.50. In all cases tried and appealed to the Circuit Court \$7.50. When a defendant is tried, convicted and appeals to the circuit court, would the clerk be entitled to receive \$15.00 or \$7.50 in County Court fees, when the case is disposed of?

"3. Under Title 45, Sec. 69, what would be chargeable to the State if the Defendant was convicted in an inferior court and appealed to Circuit Court and is sentenced to hard labor? Would the State pay the lower court cost and the circuit court cost?

"4. On preliminary hearing in felony cases \$5.00. If the defendant waives preliminary hearing, would the clerk be entitled to the \$5.00 fee? The case would have to be docketed and it is possible that the witnesses could already be summoned before the hearing was waived. I feel that the case would still have to be docketed.

"5. In all forfeiture cases \$7.50. In the event a conditional judgment of forfeiture is entered by the Court and is later set aside with no mention by the court of cost, then, in that event, is the \$7.50 fee chargeable to the defendant and sureties, and are they, the defendant and bondsmen subject to execution for collection thereof?

"6. Title 45, Sec. 69. Cases which are on the docket prior to Jan. 20, 1959, and will be disposed of after this date, which fee will apply? Is the State Comptroller suppose to pay under the old or new fees? There is no way in which to divide cost under the new criminal fees.

"7. Will a clerk who has been on a fee basis, and went on a salary on Jan. 20, 1959, be entitled to the old fees on all cases docketed and cost accrued to him before Jan. 20, 1959, and would these fees, even though they will be collected after he goes on a salary be paid to him rather than to the county?

"8. In civil cases in which a judgment has been rendered, but not paid before Jan. 20, 1959 and the attorney for the plaintiff has a garnishment proceeding filed against the defendant after Jan. 20, would the clerk be entitled to the old or new fees in the garnishment proceedings?

"9. Title 11, Sec. 89(1), sets out a .25 fee for summoning witnesses before the grand jury when no indictment is returned. This is to be paid out of the fine and forfeiture fund or general fund of the county. Would the clerks still be entitled to this or would they be entitled to the fee of \$8.00 for each misdemeanor case nol prossed or otherwise dismissed, \$10.00 for each felony case nol prossed or otherwise dismissed? The defendant is discharged when no indictment is returned.

"10. If a defendant is charged with a felony and is convicted or pleads guilty to a misdemeanor, which fees would apply, the felony fee or misdemeanor fee? The case would be put on the docket as a felony.

"11. If a defendant is arrested on two or more separate warrants on the same day, would the clerk charge the Sheriff's cost for fingerprinting in respect to each arrest or would the Sheriff be entitled to only one fee for fingerprinting?

"12. I would like for you to further clarify your previous opinion rendered me on Jan. 27, 1959 concerning criminal cases which are appealed to the Court of Appeals or Supreme Court. Your opinion in substance is—that if the case is appealed and affirmed and the defendant pays the cost, then the clerk would be entitled to both set fees, one for trial and one for preparing the appeal. If the cost be paid from funds of the state, the clerk would only receive the one set fee provided for by Act No. 542, this being either \$20.00 or \$30.00, depending upon the nature of the appeal. You also ruled that in a case where a defendant appeals and the case is reversed and retried in the circuit court and the defendant pays the cost, the clerk would receive the set fee for trial of the case a second time. If it was reversed and not appealed again, the clerk would not receive from state funds the appeal cost.

"Would not the clerk be entitled to receive from the fine and forfeiture fund or general fund of the County all the fees accumulated in the case other than what the state will pay?

"I would appreciate a reply as soon as possible so that I may let the clerks and registers know what your opinion is."

The inquiries submitted in your request for opinion relate to the newly-established schedule of costs and fees which became applicable to the clerks and registers of the circuit courts of this state on January 20, 1959. These schedules were established through the passage of some five acts by the Alabama Legislature during its 1957 Session. These acts are: Act No. 542, Acts of 1957, page 762; Act No. 543, Acts of 1957, page 764; Act No. 740, Acts of 1957, page 1169; Act No. 741, Acts of 1957, page 1170 and Act No. 742, Acts of 1957, page 1171. In a former opinion of this office rendered to you under date of January 27, 1959, a detailed discussion of the first four of such acts is to be found. Inasmuch as the inquiries propounded by you in your request for the opinion of January 27, *supra*, did not relate to the provisions of Act No. 742, *supra*, it should be here pointed out that such act amends Title 11, Section 27 of the Code of Alabama 1940, which statute relates to the fees and commissions allowed the registers of the circuit courts of this state, prescribing a new schedule of fees for services performed by such officers. together with a set or "flat" fee for services performed by such officers in divorce cases.

Your first inquiry relates to cases in the equity division of the circuit court in which there has been a final decree rendered. You point out that in many of these cases, for one reason or another, subsequent action is required after final decree. You specifically refer to divorce cases involving child custody and alimony and to estate and guardianship cases in which periodic settlements are required. You wish to know whether the register, in taxing costs for his services in these cases with reference to this subsequent action, should be guided by the schedule of fees set out in Act No. 742, *supra*, or the schedule existing prior

to January 20, 1959. Your question, perhaps, arises due to the fact that Section 2 of Act No. 742, supra, provides that, "Nothing herein contained shall affect the fees which Registers in Chancery are entitled to in those cases docketed before the effective date of this Act." I am sure that you wish to know the significance which must be attached to the word "docketed" as used in the above-quoted portion of Act No. 742, supra.

It is my opinion that any subsequent action in those cases referred to by you which have previously been determined in the equity division of the circuit court and in which a final decree has been rendered would be subject to the new schedule of fees set out in Act No. 742, supra. In my judgment, if a final decree has been rendered in the case, prior or subsequent to January 20, 1959, any future action in the matter forming the basis for such final decree would be subject to the schedule of fees set out in Act No. 742, supra. In such cases, in my opinion, the register in chancery would be entitled to receive compensation for his services based upon the new schedule of fees. This reasoning would have application to all cases in which final decree has been rendered and where further action is later required by the register with reference to such cases. This would be true even though such case might have originally been docketed prior to January 20, 1959. In my judgment, the rendering of the final decree brought to a conclusion the action instituted by means of the original case and any further or subsequent action in such matter would constitute services for which the register should be compensated in accordance with Act No. 742, supra. I should, perhaps, point out that the only set or "flat" fees provided for by Act No. 742, supra, are those relating to divorce cases. It is my judgment that any subsequent action in a divorce case in which a final decree has previously been rendered, such as a matter pertaining to child custody or alimony, would also be subject to the specific fees provided for by Act No. 742, supra, **but** the register would not be entitled to the set fee provided for by such act with reference to divorce proceedings.

Your second inquiry relates to Act No. 741, supra, which act serves to provide for a fixed amount of cost in criminal and quasi-criminal cases for clerks of the circuit courts who are ex-officio clerks of county courts, law and equity courts and courts of like jurisdiction in Alabama. Such act provides for a set fee for such ex-officio clerks for services rendered by them in criminal and quasi-criminal cases disposed of in the inferior courts which they serve. You point out that under this schedule of set fees it is provided that the clerk shall receive the following:

" * * For each misdemeanor case originating by affidavit when the defendant is tried.....7.50

" * * * In all cases tried and appealed to the circuit court7.50 * * *."

In your question you inquire as to whether the clerk would be entitled to receive both of such fees or only one in those cases in which the defendant is tried, convicted and appeals to the circuit court.

Admittedly answer to this question is dependent upon an interpretation of the provisions of Act No. 741, *supra*. The provisions of such act are not clear as to the question which you have propounded. In such a case it becomes the duty of one seeking to interpret such act to arrive at a reasonable and just construction of same which would be in accord with the legislative intent existing at the time of passage of the act in question. This is what I have attempted to do in giving answer to your second inquiry.

In my judgment, in a case such as that outlined by you, the circuit clerk, serving as ex-officio clerk of the inferior court, would only be entitled to one fixed fee of \$7.50 for his services in those cases originating in the inferior court in which there was a conviction and appeal to the circuit court. There is no question but that the clerk is entitled to \$7.50 for each misdemeanor case originating by affidavit, when the defendant is tried. The question next arises as to whether or not, under the terms of the second proviso quoted above, he would be entitled to a second fee of \$7.50 in the event such case is appealed to the circuit court. I do not think that such is the case.

I base my reasoning upon the fact that, had it been the desire and intent of the Legislature to make this second fee applicable, it would have been a relatively easy matter to have done so. With reference to the second-quoted proviso, the Legislature could have manifested such intent merely by the elimination of the word "tried." It could also have manifested such intent by the simple addition of the words "In addition to the above cost" as was done with reference to those cases in which appeal is had to the Court of Appeals of our State. Either of such methods would have been sufficient to have eliminated doubt on this question. It is also pertinent to note that there is no difference in the amount provided for the clerk for his services in those misdemeanor cases originating by affidavit when the defendant is tried and in such cases when appealed to the circuit court. It should also be pointed out that the fees provided for by Act No. 741, *supra*, relate only to the services performed by the circuit clerk in his ex-officio capacity as clerk of the inferior court in question and, when such case is appealed to the circuit court, in his capacity as clerk of the circuit court, this officer will become entitled to the set fees provided for by Act No. 543, *supra*, which makes provision for his compensation in those cases heard and determined in the circuit court.

For all of the above reasons, and trying as best I can to analyze and determine the legislative intent surrounding the passage of this particular act, I am led to the conclusion that the clerk would be entitled to only one fee of \$7.50 for his services in the inferior court for misdemeanor cases originating by affidavit in which the defendant is tried,

convicted and appeal is had to the circuit court. I further believe that for his services in the circuit court upon appeal, the clerk would be entitled to the fee provided for by Act No. 543. *supra*. It would, perhaps, be significant to point out that, in situations of this nature wherein one officer serves as clerk of the circuit court and also ex-officio clerk of the inferior court from which the appeal is taken, little service is rendered by such officer in perfecting an appeal from the inferior court to the circuit court. Subsequent to the appeal, and for his services in the circuit court, the clerk would receive the set fees allowed by Act No. 543. *supra*. I, therefore, conclude that for his services in the inferior court in the type cases here considered, he would only be entitled to one set fee of \$7.50.

Your third inquiry relates to the provisions of Act No. 542, *supra*, which act serves to amend Title 45, Sections 69, Code of Alabama 1940. This statute, as amended by Act No. 542, *supra*, sets out those costs which are payable from state funds under the conditions there stated. In your inquiry you present a situation in which a defendant is convicted in an inferior court and appeals to the Circuit Court where he is sentenced to hard labor. You inquire as to whether the cost of the circuit clerk arising in each of such courts would be payable under Title 45, Section 69, as amended, *supra*. In my judgment, insofar as the circuit clerk is concerned, those costs accruing to him in each of such courts would be payable from state funds under the provisions of Title 45, Section 69, Code of Alabama 1940, as amended, *supra*. You will note, by reference to Act No. 542, *supra*, that a schedule of set fees for the clerk which are payable from state funds for his services in the circuit court are there set out and, likewise, a schedule of set fees payable from state funds for circuit clerks who serve as ex-officio clerks of inferior courts are also set out. In a case such as that presented by you in your inquiry, fees would accrue to the clerk in each of such courts and, **in my opinion, upon final conviction of this defendant in the circuit court and his sentencing, the clerk would be entitled to claim for his services from state funds the set fee provided for by Act No. 542, *supra*, with respect to each of the courts in which such case was tried.**

In your fourth inquiry you refer to the provisions of Act No. 741, *supra*, with particular reference to the fee of the clerk of the court with respect to preliminary hearings in felony cases. As noted previously, Act No. 741, *supra*, applies to those circuit clerks who act as ex-officio clerk of the inferior courts there named. It is provided by Act No. 741, *supra*, that the clerk shall earn a set fee of \$5.00 for services rendered on preliminary hearings in felony cases. You inquire as to whether or not the clerk would be entitled to this fee if the defendant waived preliminary hearing.

In my opinion, the clerk would NOT be entitled to the five-dollar fee allowed by Act No. 741, *supra*, if the defendant waived preliminary hearing prior to the commencement of the hearing itself. As I understand this particular provision of Act No. 741, *supra*, the clerk is only

entitled to the five-dollar fee in the event there is a preliminary hearing in a felony case. If there is a waiver of such hearing, then it would follow that the clerk would not be in position to earn the fee in question. I do believe, however, that if the preliminary hearing is entered into in any respect the clerk would become entitled to the fee, even though the defendant might prior to the completion of the hearing see fit to waive further proceedings. In substance, it would be necessary for there to be a preliminary hearing for the clerk to become entitled to the fee here in question and if this hearing is entered into the clerk thereupon becomes entitled to the five-dollar fee. If not, then no such fee would attach.

In your fifth inquiry you refer to that provision of Act No. 741, *supra*, which provides that the clerk shall receive "In all forfeiture cases \$7.50." You inquire as to whether, in the event a conditional judgment of forfeiture is entered by the court and is later set aside with no mention by the court of cost, the \$7.50 fee would be chargeable to the defendant and his sureties and whether they are subject to execution for the collection thereof.

It is my opinion that once there has been a conditional judgment in the forfeiture case the clerk would become entitled to the set fee provided, by law, even though this conditional judgment later be set aside by the court, provided costs are taxed by the court and judgment entered therefor. It would be my judgment that the clerk would have earned his fee in such an event but before it would be chargeable to the defendant and his sureties so that execution might issue against them for its collection, it would be necessary that costs be taxed against the defendant and his sureties and judgment entered therefor. In my opinion, the fee attaches to the forfeiture "case," and I believe that a "case" exists once the forfeiture proceedings are docketed and judgment is entered therein by the court even though this later be set aside; however, to authorize collection costs should be taxed by the court against the party liable therefor. Although not mentioned in this particular inquiry, a similar situation exists with reference to the set fees allowed the clerks of the circuit courts for their services with reference to forfeitures in the circuit court. Reference to Act No. 543, *supra*, will reveal that this act provides a set fee for the circuit clerk in two instances, the first being on conditional judgments on forfeitures set aside on payment of cost and, the second, for each forfeiture case after final judgment. Here again, I believe that, with respect to the first of such cases, the fee named would accrue to the clerk if the judgment is set aside and that the clerk would be able to charge same to the defendant and his sureties and issue execution to enforce collection thereof, provided such costs are taxed against the defendant and his sureties and judgment entered therefor.

Your sixth inquiry refers to Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 542, *supra*. You make reference to cases which are on the docket prior to January 20, 1959. the effective date

of Act No. 542, supra, which will be disposed of after such date and inquire as to whether the schedule of fees existing prior to January 20, 1959 or that schedule existing thereafter will have application to such cases.

In my opinion, answer to this inquiry is to be found in Section 2 of Act No. 542, supra, which provides that:

"After its passage and approval this act shall become effective in each county at the expiration of the term of the incumbent circuit clerk and shall apply to or affect cases filed after such date."

You will note from the above that the provisions of Act No. 542, supra, as they amend Title 45, Section 69, Code of Alabama 1940, only apply to or affect cases filed after the effective date of such act. It has been previously determined that the effective date of such act is January 20, 1959 and, **consequently, those cases filed prior to such date, even though disposed of after January 20, 1959, would be subject to the schedule of fees existing at the time of their filing, which was a date prior to January 20, 1959.** This is what we commonly refer to as the "old schedule of fees." On the other hand, all cases filed on or after January 20, 1959 will be subject, insofar as the fee of the clerk is concerned, to the provisions of Act No. 542, supra, and the clerk would receive that schedule of fees provided for therein. For the purposes here mentioned, I consider the word "filed" to be synonymous with that of "docketed" and you may so consider same in determining the schedule of fees applicable to any of such cases.

In your seventh inquiry you present a situation wherein a circuit clerk prior to the commencement of his new term of office on January 20, 1959, was compensated upon a fee basis whereas, when entering upon his new term of office, he became subject to a salary basis of compensation. You inquire as to whether or not such officer would be entitled to the fees accruing to him in those cases docketed prior to January 20, 1959, for services performed prior to such date, and whether or not he would receive such fees even though they were collected subsequent to January 20, 1959, after he had entered upon a term of office in which he was paid on a salary basis.

To answer your inquiry, reference should be made to the above answer to your sixth question. It was there pointed out that in those cases docketed prior to January 29, 1959, the old system of fees under which circuit clerks were compensated would have application. In the instant case you present a situation wherein a circuit clerk, prior to January 20, 1959, was compensated on a fee basis. Under such conditions the fees accruing to his office belong to him rather than to the county. You further state that as of January 20, 1959 he became subject to a salary basis of compensation whereby the fees accruing to his office were payable to the county. Under these conditions, I feel that, in those cases docketed prior to January 20, 1959, the old system of fees would apply. **If the clerk performed services in these cases prior to**

January 20, 1959, whereby he became entitled to a fee under this old system of fees, I feel that such fees belong to him and, when collected, should be paid over to him rather than to the county. On the other hand, if he performed services in these cases to which a fee attaches after January 20, 1959, I feel that payment for these latter services should accrue to the county.

Your eighth question relates to the provisions of Title 11, Section 21, Code of Alabama 1940, as amended by Act No. 740, *supra*. This particular statute provides for a schedule of fees applicable to the clerks of the circuit courts for services rendered by them in civil proceedings tried in their respective courts. In your question you present a situation wherein a civil case was tried and judgment rendered therein prior to January 20, 1959. Inasmuch as such judgment was not paid, the plaintiff, subsequent to January 20, 1959, filed a garnishment proceeding against the defendant. You wish to know whether the circuit clerk would be entitled to the old or new fees with respect to this garnishment proceeding.

In my judgment, the schedule of fees provided for by Act No. 740, *supra*, as it amends Title 11, Section 21, Code of Alabama 1940, would have applicability to the garnishment proceeding. The original civil case having been tried and judgment rendered prior to January 20, 1959, the fees which were provided for by Title 11, Section 21, *supra*, prior to the amendment, would have application to the original suit. However, in my judgment, the garnishment proceeding is a matter separate and distinct from the original suit and, having been filed subsequent to January 20, 1959, **I feel that the set fee of \$6.00 now provided for in matters of this nature by Act No. 740, *supra*, would have application to this proceeding, insofar as the fees of the circuit clerk are concerned.**

In your **ninth** inquiry you make reference to the provisions of Act No. 416, General Acts of 1945, page 659 (Title 11, Section 89(1), Code of Alabama 1940, Pocket Supplement), which act provides that:

"Section 1. Every clerk of the circuit court who summons witnesses to appear before the grand jury, if no indictment is returned, shall be entitled to a fee of twenty-five cents for issuing such subpoena to such witnesses.

"Section 2. The fee herein provided for shall be paid out of the fine and forfeiture fund of the county. In counties in which there is no fine and forfeiture fund, the fee shall be paid out of the general fund of the county."

It is further provided that such act shall not apply to counties in which the circuit clerk is on a salary basis. In your ninth question you inquire as to whether the clerk would be entitled to this twenty-five-cent fee or whether same would be included within the schedule of set fees provided for circuit clerks by Act. No. 543, *supra*, amending Title 11, Section 89, Code of Alabama 1940.

In my judgment, there is no relation between the twenty-five-cent fee provided for by Act No. 416, supra, and that schedule of set fees provided for by Act No. 543, as it amends Title 11, Section 89, supra. You will note that the twenty-five-cent fee applies only to witnesses summoned by the circuit clerk to appear before the grand jury in cases in which no indictment is returned. On the other hand, the schedule of set fees provided for by Act No. 543, supra, applies to cases actually docketed in the circuit court. In the event there is no indictment, which is the situation here, no "case," as such term is used within the meaning of Act No. 543, ever existed and, consequently, the set fees provided for by such act have no application. Under such conditions, the clerk would be entitled to the twenty-five-cent fee provided for by Act No. 416, supra, for summoning witnesses before the grand jury in those cases in which no indictment is returned.

With regard to your tenth inquiry, it is necessary that I analyze same and condition my answers thereto as to the two situations presented by the inquiry. In this particular question you inquire as to whether, in those cases wherein a defendant is charged with a felony and is convicted or pleads guilty to a misdemeanor, the clerk would be entitled to fees as to a misdemeanor case or a felony case.

Reference to Act No. 543, supra, as it amends Title 11, Section 89, Code of Alabama 1940, reveals that in the schedule of set fees there set out a different fee is provided for the services of the clerk of felony cases from that provided in misdemeanor cases. It thus becomes important to determine the nature of the case in that situation which you have set out in your inquiry. **In my opinion, the fee to which the clerk would be entitled under this particular Act would be governed by the nature of the charge under which the defendant entered upon trial.** If a defendant is charged with an offense constituting a felony and enters upon trial under such charge and is subsequently convicted of a misdemeanor, I believe that the clerk would be entitled to that set fee which applies to trial of a felony case, this being the charge under which the defendant was tried. On the other hand, if a defendant be charged with an offense constituting a felony and, prior to trial, through agreement with the prosecuting officer or otherwise, his offense is reduced to that of a misdemeanor in order to accept a plea of guilty, I believe that the fee to which the clerk would be entitled would be that provided for in misdemeanor cases, as this defendant was never tried for a felony. As to those cases dismissed or nol prossed, I believe that the offense of which the defendant was charged at the time of the dismissal or nol pross would be the determining factor. If the defendant was charged with an offense constituting a felony and this charge was dismissed or nol prossed, I believe that the clerk would be entitled to the set fee provided for by Act No. 543, supra, for felony cases nol prossed or otherwise dismissed. With regard to misdemeanor charges dismissed or nol prossed, I believe that the fee applicable to misdemeanor cases would apply.

To answer your specific question, I believe that if a defendant is charged with a felony and is tried under such charge and is subsequently convicted of a misdemeanor the clerk would be entitled to the fee provided for by Act No. 543, supra, with relation to trial of felony cases. If the defendant is charged with a felony and, prior to trial, pleads guilty to a misdemeanor, I believe that the clerk would be entitled to the fee provided for by Act No. 543, supra, applicable to the trial of misdemeanor cases.

In your eleventh question you make inquiry concerning the requirements pertaining to the fingerprinting of persons taken into custody by the sheriffs of this State. You inquire as to whether a defendant, who is arrested on two or more warrants on the same day, should be fingerprinted more than one time and also as to whether or not the sheriff would be entitled to the fee provided for by law to each arrest or whether he would be entitled to one fee for fingerprinting the defendant each time he is taken into custody.

A brief review of the acts and statutes of this state relative to the requirement that persons taken into custody be fingerprinted reveals that such first became applicable by virtue of Act No. 420, Acts of 1943, page 385. This act provides that it shall be the duty of the sheriff of each county in this State, who shall first take a person into custody, to fingerprint such person and furnish a copy of such fingerprints, with the fingerprint card properly filled out, to the Director of the Federal Bureau of Investigation, Washington, D.C., and a copy to the Director, Department of Public Safety, State Bureau of Investigation and Identification, Montgomery, Alabama. Such requirement is now found in Title 54, Section 38, Code of Alabama 1940 (Pocket Supplement). It is further provided by Act No. 420, supra, that in criminal prosecutions there shall be taxed as costs in the case, a fee of ten cents for taking fingerprints in the manner set out above. This fee has now been increased to \$1.00 by Act No. 571, Acts of 1955, page 1243, which increase is to be found also in Title 11, Section 100, Code of Alabama 1940, as amended by Act No. 571, supra. This, too, would be in the Pocket Supplement of such Code of Alabama 1940.

It is to be noted that in the original act, Act No. 420, supra, as well as in Act No. 571, supra, amending Title 11, Section 100, supra, the right to such fee seems to be based upon the taking into "custody" of the person so arrested or apprehended. With this in mind, it is my opinion that, if a person be arrested on one or more warrants, charged with one or more offenses at one and the same time, he would only be taken into "custody" once by the arresting officer. He would not be taken into custody as to each and every count or each and every warrant of arrest. Quarterly Report of Attorney General, Volume 33, page 31. Based upon this premise, it is my judgment that the sheriff would be entitled to the fee allowed each time he took a person into custody. If such person were taken into custody and subsequently released from custody and later taken into custody again on a new charge

then, in such event, the sheriff would be required to again fingerprint such person and would be entitled to the fee allowed by law for so doing.

Referring again to the provisions of Act No. 420, supra, and particularly Section 5 thereof, it is to be noted that such fee is to be taxed only in "criminal prosecutions." Should the sheriff take into custody a person who is subsequently released without charge or through failure of the grand jury to indict him, then the fee allowed for fingerprinting could not be taxed as cost in the case, as no case ever existed. This is mentioned to acquaint the clerk with the fact that such fee is only to be taxed as cost in those instances where a criminal prosecution results from the taking into custody of the person so fingerprinted.

To answer your specific question, if a person be taken into custody the sheriff should thereupon fingerprint such person in accordance with the requirements of Act No. 420, supra. If such person be released from custody and later taken into custody again on a new and different charge, the same provisions of law would again come into play and he should again be fingerprinted by the sheriff in the manner required. **This would be true irrespective of the interval of time intervening between the two acts of "taking into custody."**

Your twelfth and last inquiry pertains to the right of the clerk to make claim upon the fine and forfeiture fund of the county, or its equivalent, for those items of cost accruing to the clerk which are not paid from other sources in the manner prescribed by law. It should be noted that fees in criminal cases may accrue to the clerk under the provisions of Acts No. 543 and No. 741, supra. The first of such acts relates to the fees of the clerk to be received by him for services in criminal cases in the circuit court while Act No. 741, supra, relates to the fees to be received by him for services rendered in criminal cases in inferior courts served by him in an ex-officio capacity. Act No. 542, supra, amends Title 45, Section 69, Code of Alabama 1940, and prescribes the amounts which will be paid from state funds under the conditions there set out. It will be noted that in certain instances the amounts which accrue to the clerk under the acts mentioned are not the same as those amounts which will be paid from state funds under the terms of Act No. 542, supra. Your inquiry, reduced to its essence, is whether or not this difference may be paid from the fine and forfeiture fund of the county, or its equivalent.

Title 15, Section 393, Code of Alabama 1940, pertains to those payments of fees of officers of the court which may be made from the fine and forfeiture fund of the county and the condition under which such payments may be made. This statute provides that in certain cases officers of the court, which would include the clerk, may make claim upon the fine and forfeiture fund of the county for those items of cost accruing to them which have not been paid from other sources. With respect to your present inquiry, I would advise that you are correct in

your interpretation of the opinion previously rendered you under date of January 27, 1959. In that opinion it was pointed out that in cases appealed to the Court of Appeals or the Supreme Court and there affirmed the amount paid from state funds pursuant to the provisions of Title 45, Section 69, *supra*, as amended by Act No. 542, *supra*, would be different in amount from those amounts accruing as fees to the clerk for his services in the trial of and preparation of the appeal in the particular case, which fees would be taxed against the defendant concerned. In the event these costs are not paid by the defendant and the clerk receives from state funds the amount provided for by Title 45, Section 69, *supra*, you wish to know if the clerk may make claim upon the fine and forfeiture fund, or its equivalent, for the difference in these amounts.

In my judgment, such action is authorized by Title 15, Section 393, *supra*. This statute provides that claim may be made upon such fund by the officers of the court for cost arising as a result of trials therein and also provides that claim may be made by such officers against such fund for cost arising as a result of appeals from the lower courts. With respect to the trial of felonies, it is required that there be an execution issued for cost against the defendant with a return of "no property found." The same is true with respect to cost arising as a result of appeals. **To answer your inquiry, it is my opinion that if the requirements of Title 15, Section 393, *supra*, be met, the officers of the court, including the clerk, may make claim upon the fine and forfeiture fund of the county, or its equivalent, for those items of cost which they have not received from other sources in the manner required by law. This would mean that in the situation you have presented the clerk would be authorized and permitted to make claim against the fine and forfeiture fund, or its equivalent, for those fees which have not been received by him from state funds, or otherwise, arising as a result of the appeal there mentioned.**

Very truly yours,

MACDONALD GALLION

Attorney General

May 16, 1961

Honorable James T. Beeland

Judge of Probate

Butler County

Greenville, Alabama

Licenses—Vending Machines

1. The second proviso contained in Section 613, as amended, Title 51, Code of Alabama 1940, would relieve the operator of a vending machine from having to pay a vending machine license, where either such operator, or the proprietor of the place of business in which the vending machine or machines have been installed, has procured a license under one of the schedules contained in Title 51, Chapter 20, Article 1, Code of Alabama 1940, to sell the specific article being sold through the vending machine.

2. The procurement of a store license under the provisions of Section 620 et seq., Title 51, Code of Alabama 1940, would not meet the conditions of said proviso contained in Section 613, as amended, supra, as that license is for the privilege of operating a store and not for the privilege of selling any of the specific articles designated under Chapter 20 of Title 51, supra.

3. The operators of vending machines through which milk and orange drinks are sold in paper cartons would be subject to the payment of a vending machine license for each vending machine so operated. The second proviso of Section 613, as amended, supra, could not be applicable to such cases, as none of the license schedules contained in Chapter 20 of Title 51, supra, require a license for the sale of these specific articles.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of October 22, 1960, is as follows:

“Re: Title 51, Section 482, Soft Drinks, Section 613—Vending Machines.

“It is my understanding that a person who wishes to operate a coke machine may buy a license under either of the above sections. Does the same hold true for a vending machine selling milk and orange drinks packaged in cartons?”

Your question relates to the second proviso contained in the so-called Vending Machine License Tax Statute, Title 51, Section 613, as amended, Code of Alabama 1940.

The second proviso in Section 613, as amended, *supra*, reads as follows:

“Provided that no license shall be required under this section where a privilege or dealer’s license is required by this chapter **for the sale of such articles and such privilege license** shall have been obtained by the person, firm or corporation operating the place of business where such machine is located, or the owner of such vending machine shall have secured such privilege license as required herein.” (Emphasis supplied)

In the case of **Brown v. Southern Cigarette Service Company**, 269 Ala. 539, 114 So.2d 387, the Supreme Court of this State held that under said second proviso in this statute no vending machine license would be required, and the proviso would be applicable where a vending machine company had installed and was operating cigarette vending machines in restaurants and other places of business in this State, where either the restaurant keeper or the vending machine company had procured a retail dealers tobacco license under Title 51, Section 484, Code of Alabama 1940, to sell cigarettes at retail in such restaurant or other business establishment.

As a matter of administrative interpretation of the statute and particularly said second proviso contained therein, the State Department of Revenue has in the light of the decision of the Court extended the exception to those persons who have procured the dealers license to sell soft drinks in bottles under Title 51, Section 482, Code of Alabama 1940, under the same circumstances as those which related to the sale of cigarettes through vending machines in the **Southern Cigarette Service Company** case, *supra*, and who sell bottled soft drinks through vending machines in such business establishments.

It will, however, be noted that the framers of the proviso have been very careful to limit its operation to cases where a “dealers license is required by this chapter **for the sale of such articles.**” The Supreme Court in its decision in **Brown v. Southern Cigarette Service Company**, *supra*, also took pains to refer to this particular requirement of the proviso.

The proviso then has never been extended to any case other than where a specific license is required and has been obtained for the privilege of selling at retail one of the specific articles which has been described in Section 613, as amended, *supra*. The proviso has never then been extended to include the “store” license levied under Title 51, Section 620, et seq., Code of Alabama 1940, which has been held to be a license “to operate, maintain, open or establish any store in this state,” and not a license under Title 51, Chapter 20, Article 1, Code of Alabama 1940,

required for the sale of the specific articles which have been designated in the license schedules contained in said Chapter.

In the cases of **Roy Hudson, etc. v. State of Alabama**, and **North Main Service Station v. State of Alabama**, Nos. 2029 and 2030, in Equity, which were decided by the Circuit Court of Coffee County, Alabama, Enterprise Division, in 1956, the Court had before it the question of whether or not the operators of vending machines which were used to vend peanut sandwiches, cakes and candies, and which were installed in places of business where the proprietors had purchased the store license under Section 620 of Title 51, *supra*, would be relieved from paying the vending machine license on such machines under said proviso in Section 613. In deciding this question in the negative in both cases, the Court held in the **Hudson** case, as follows:

"The Court concludes in this respect that the second proviso contained in Section 613, as amended, *supra*, and on which the Appellant relies, is applicable only where one has purchased a license required for the privilege of selling one of the commodities specifically described in said vending machine license statute. This would not include the store license which is levied under the provisions of Title 51, Section 620 et seq., Code of Alabama 1940, in that the store license is levied for the privilege of operating a store, and not for the privilege of selling or vending any specific commodity or article of merchandise." (Emphasis supplied)

These decisions were not appealed and still stand, and have been relied upon by the State Department of Revenue in enforcing this statute throughout the State.

None of the license schedules under Title 51, Chapter 20, Article 1, *supra*, cover the sale of milk or orange drinks where such articles are sold in paper cartons, unless it can be said that the sale of same when made in paper cartons is covered by the retail dealers soft drink license under Title 51, Section 482, Code of Alabama 1940. This, however, appears to be ruled out because the soft drink license is expressly said to apply **only in cases where such drinks are sold in bottles.**

The so-called milk store license provided for in Act No. 893 of the 1953 Regular Session of the Legislature, approved September 21, 1953, Page 1199, requires a license fee of \$2.50 to be paid to the Judge of Probate of the county for each retail store where milk is sold in the milk shed in this State, and for the privilege of buying, selling, handling or distributing milk at such store or stores. The proceeds of such license fees are to be distributed by the Probate Judge or Commissioner of Licenses, as the case might be, directly to the milk control board, and such accounts are to be audited by the employees of said board, and not by the license inspector for the county or the State Department of Revenue. These statutes are clearly then a part of the scheme of regulatory laws relating to milk and the State Milk Control Board, which are contained in Title 22, Sections 205, 231, *inc.*, Code of Alabama

1940, and particularly to Sections 213, 214, and 215 relating to the issuance of a regulatory license by the State Milk Control Board, and have been so associated by the Legislature in the Title to Act No. 893, supra. Mitchie, in compiling the pocket parts to the present Code, included the provisions of Act No. 893, supra, under Title 51 and in the Revenue Code as Sections 553(1)-(6) of Title 51, and as a part of the license tax schedules under Chapter 20, Article 1. Actually, this license fee which is associated with said regulatory laws is not a part of Chapter 20, Article 1, Title 51, as adopted by the Legislature. For these reasons it clearly appears that said license fee is not a part of the Revenue laws of the State nor one of the specific license taxes under Chapter 20 which are contemplated under the provisions of said second proviso contained in Section 613, as amended, Title 51, supra.

Your question then is answered in the negative, and to the effect that the vending machine license under Section 613, as amended, supra, would be due as to the vending machines which are the subject of your inquiry, as the second proviso contained in that Section would not be applicable in such cases.

Very truly yours,

MACDONALD GALLION

Attorney General

June 2, 1961

Honorable J. C. White, Chairman

Board of Revenue and Control of Chilton County

P.O. Box 557

Clanton, Alabama

Counties—Employment, Employers and Employees Compensation

The governing body of a county is authorized to enter into contracts of employment with its salaried employees whereby such employees may be compensated on an "overtime" basis for work performed over and above that prescribed in the contract of employment.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 4, 1961, is as follows:

"Most of our employees are paid salaries on a monthly basis and their normal work day is nine hours per day, five days per week.

"Please advise us as to whether they may legally be paid for overtime work in the performance of their regular duties."

In my opinion, answer to your inquiry is dependent in its entirety upon the conditions of employment under and by which the employees concerned were engaged by the county.

As I understand your request, it is restricted in its application to those employees of the county who are employed on a monthly basis with a salaried compensation at a fixed figure per month. No question could exist as to those employees paid on an hourly basis as any additional time worked by them would be compensated by payment of the hourly rate for the time so worked.

In my opinion, it would be possible for the county governing body to employ its personnel under such terms and conditions as to authorize the payment of overtime compensation for work performed in addition to the regular routine employment of the persons concerned. Most contracts of employment are predicated on some mutual understanding between employer and the employee as to the nature of the work to be performed and the duration and extent of the services anticipated by the employer. In many phases of our economy working time is based upon the forty hour week and employees are compensated for any time worked in excess thereof.

I note from your inquiry that your salaried employees are normally expected to work forty-five hours per week, that is five nine-hour work days. In my opinion, your county governing body would be authorized to prescribe conditions of employment for the county employees whereby they were employed and their compensation was fixed upon the basis of a work week of a certain number of hours and further provide in such contract of employment that work performed over and above that prescribed would be considered as "overtime" and that additional compensation would be received for same. To do so, however, I feel that the county governing body should enter into specific contracts of employment to this effect, spelling out the conditions of such employment and the provisions as to compensation for any overtime performed. I feel, too, that such conditions of employment should be uniform and equally applicable to all employees within any given group or classification. If this be done, I would feel that the county governing body would be authorized to pay to these employees such compensation as they might earn by reason of overtime services.

I would call to your attention the provisions of a former opinion of this office found in Quarterly Report of Attorney General, Vol. 51, page 89, which deals with the matter and question of the power of the county governing body with regard to the providing of vacation time for employees engaged in road and bridge construction and maintenance for the county. It was concluded that such lay within the authority and jurisdiction of the county governing body, citing as the authority

therefor the provisions of Title 23, Section 43, Code of Alabama 1940. Although this statute and opinion has application only to the road and bridge employees of the county, it is my opinion that such reasoning should be extended to such other employees as might be engaged by the county and that it would rest within the jurisdiction and authority of the county governing body to provide and prescribe the conditions under which such employees were to be engaged. As I have noted, if one of the conditions of employment is that such employees will be compensated for services performed over and above a given standard, the county would then be authorized to make payment for any services so rendered under this contract.

Very truly yours,

MACDONALD GALLION

Attorney General

June 9, 1961

Honorable John R. Sparks

Circuit Clerk

Cullman County

Cullman, Alabama

Court Reporters—Costs and Fees—Opinions Overruled,
Modified or Distinguished

1. The fee for transcription of testimony authorized the court reporter in the circuit court on appeal of a civil case is a part of the costs of the case.
2. Opinion by this office, dated January 12, 1961, is hereby withdrawn.
3. Quarterly Report of Attorney General, Volume 46, page 5 and Quarterly Report of Attorney General, Volume 48, page 158, insofar as they conflict with this opinion, are hereby overruled.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have your request for official opinion of this office dated December 12, 1960, which is as follows:

"Please furnish me an official opinion concerning the costs pertaining to the Court Reporter's transcript of the evidence.

"The facts in the matter are that the appellant gave notice of appeal, ordered the transcript from the reporter, paid for it, and gave security for cost in the matter. The appellant won the case on appeal, and on remand, was discharged as a party in the cause of action. The appellant then demanded of me the costs for the transcript that he had paid, or that I levy execution against the appellee for all the costs, including the amount paid for the transcript.

"Please refer to Atty. Gen. Report Vol. 46, 1947.

"Your immediate reply to this inquiry will be very much appreciated."

Along with your letter, you enclosed a photostatic copy of a notice from the Clerk of the Supreme Court of Alabama in the case of W. E. James, Appellant, v. Roy Handley and Mrs. Roy Handley, Appellees, wherein the Supreme Court of Alabama reversed the cause and ordered execution for the costs accruing on appeal and in the court below.

In civil appeals, the fee for the court reporter for preparing a transcript is a part of the costs of the case. See Section 1, Act No. 80, Acts of Alabama 1953, page 122, amending Section 4 of Act No. 886, Acts of Alabama 1951, page 1527, amending Act No. 461, General Acts of Alabama 1943, page 423. (See Title 7, Section 827(2), Code of Alabama Recompiled 1958.) In accordance with the order of the Supreme Court, Appellee should pay all costs and, if not, execution should issue.

In Quarterly Report of Attorney General, Volume 46, page 5, and Quarterly Report of Attorney General, Volume 48, page 158, it was held that the fee for the court reporter for preparing a transcript is not a part of the costs of the case. That portion of those two opinions is hereby overruled and my opinion to you, dated January 12, 1961, is hereby withdrawn.

Yours very truly,

MACDONALD GALLION

Attorney General

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